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BRIAN MICHAEL GALL, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals and families whose lives have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation, and the characteristics of the offender. In short, FAMM believes that the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and *sufficient but not greater than necessary* to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

Properly understood and applied, this Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Rita*, 127 S. Ct. 2456 (2007), represent important steps in that direction. FAMM believes that, in contrast, the Eighth Circuit's decision in this case is flatly inconsistent with those rulings and the Sixth Amendment.

SUMMARY OF ARGUMENT

I. The core congressional command in 18 U.S.C. § 3553(a) is that district courts must "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has now reasserted itself in light of *Booker*. By excising the conflicting command requiring district courts to hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing proc-

ess just as they were required to follow the Guidelines before *Booker*.

II. As construed by this Court's decisions in *Booker* and *Rita*, the SRA provides different, but complementary, roles for the district and appellate courts in the system of federal sentencing.

Together, *Booker* and *Rita* establish certain bedrock principles. The first is that, under the unitary standard of appellate review established in *Booker*, no presumption in favor of a Guidelines sentence binds the district court. Although the properly calculated guideline range is a factor to be considered in all cases, it is *not* a tether, anchor, or baseline. The second principle, which follows from the first, is that regardless of whether the sentence is inside or outside the guideline range, that sentence is entitled to substantial deference on appellate review. Accordingly, the district court is the primary actor in the sentencing process and retains considerable discretion, subject to the requirements of § 3553(a), in selecting an appropriate sentence.

The obligation of a district judge is to impose an individualized sentence that "consider[s]" the various factors set forth in § 3553(a), giving those factors the weight the judge thinks appropriate in the circumstances, subject to the overarching requirement of parsimony. This consideration requirement reflects the overriding importance of two indispensable elements of just sentencing: reasoned judgment and individualized tailoring. Section 3553(a) compels sentencing judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. Judges must

then exercise reasoned discretion to tailor a sentence for the particular person who stands before them, and ultimately provide a statement of reasons for the sentence under 18 U.S.C. § 3553(c) that reflects compliance with the statutory directives.

In turn, the purpose of appellate review in this scheme is simply, but importantly, to ensure that district courts do not act unreasonably under those statutory requirements. Appellate review is not designed to, and may not, surreptitiously resuscitate the system of binding Guidelines rejected in *Booker*. Thus, whether a sentence falls within a guideline range, above it, or below it, the same criteria should be applied in determining whether a sentence is reasonable. If the appellate court is satisfied that a procedurally correct sentence has been imposed, further review of the sentence for reasonableness should be guided by two principles. First, to ensure that a court of appeals retains an ability to remedy a true outlier sentence, while ensuring that the appellate court does not substitute its judgment for the decision of the judge who actually looked the defendant in the eye, the appellate court should be permitted to review the sentencing result only under the deferential standard described by this Court in *Koon* v. *United States*, 518 U.S. 81 (1996).

Second, because a district court's primary task is to comply with the parsimony requirement in § 3553(a), the reviewing court should always ask itself whether the district judge imposed the least restrictive sanction necessary to achieve the specified purposes of sentencing. If the court of appeals is *not* convinced that the district judge reasonably concluded that he or she imposed the least severe pun-

ishment necessary to satisfy the specified purposes of sentencing, then the sentence should be vacated.

III. Given the overriding importance of parsimony and § 3553(a)'s requirement that district courts individually consider a range of specified sentencing factors, there is no basis for requirements, such as those imposed by the Eighth Circuit, that a significantly out-of-guideline sentence be justified by "extraordinary circumstances" and that greater justification is required the more the sentence varies from what the court of appeals called the "presumptively reasonable" guideline range. Indeed, those requirements replicate the kind of unconstitutional sentencing regime struck down by this Court in *Blakely* v. *Washington*, 542 U.S. 296 (2004) and again in *Booker*, and are indistinguishable from the "presumption of unreasonableness" for non-Guidelines sentences that this Court rejected in *Rita*.

ARGUMENT

I. Congress Has Directed That The Principle Of Parsimony, Which Has Roots In Our Nation's Founding, Must Be The Touchstone For All Sentencing Decisions.

In 18 U.S.C. § 3553(a), Congress required that district courts "impose a sentence sufficient, but not greater than necessary, to comply" with specified purposes of punishment. Far from being empty verbiage, that imperative—the principle of parsimony—has a long and distinguished intellectual pedigree.

A. "All punishment which is not derived from necessity," wrote Montesquieu in 1748, "is tyrannical." Baron Charles de Montesquieu, *The Spirit of the Laws*, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This

simple but profound idea was to have immense influence on criminal law reformers from the eighteenth century to the twentieth. Indeed, *Spirit of Laws* "was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems *v.* United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 811 (1975).

Writing in 1764, the great Italian criminologist Cesare Beccaria openly acknowledged his debt to Montesquieu in formulating his own philosophy of punishment:

> Every punishment, which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare M. Beccaria, *An Essay On Crimes and Punishments* 20 (Adolph Caso ed. 1984) ("*Beccaria*"). Beccaria's basic insight, which he derived from Rous-

seau's theory of the social contract, was that each individual, in forming political society, "would choose to put into the public stock the smallest portion possible" of his liberty, "as much only as was sufficient to engage others to defend it." *Id.* at 20-21. For that reason, punishment must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.* at 21. Beccaria thus argued that all punishments that "exceed the necessity of preserving" the bonds holding individuals together in society "are in their nature unjust." *Id.*

Influenced by Beccaria, the English philosopher Jeremy Bentham advocated a very similar doctrine, although he justified it in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *the punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*" Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION, ch. XIV, para.13 (1781) (emphasis added). Parsimony, according to Bentham, derives from a straightforward cost-benefit calculus: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. The fact that the same principle of punishment could be grounded in both the social-contract and the utilitarian traditions undoubtedly helps account for its widespread acceptance and importance in the years to come.

And, indeed, these thinkers and their ideas had an immense influence on the founding generation in America. "In every colony, the ideas and writings of

such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813; see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (observing that "Beccaria, and his French and English followers, influenced American thought in the critical years following our Revolution."). An American edition of Beccaria's treatise possibly appeared as early as 1773, and certainly no later than 1776. See *Becarria* at 7 (Editor's Introduction). In the years between the signing of the Declaration of Independence and the ratification of the Constitution, "the book appeared in translation in practically every cultural center of Europe and America." *Id.* During this period, American lawyers and political leaders were making serious efforts at legal reform, attempting to bring American law into greater harmony with the principles of justice and liberty that animated the Revolution. See Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 814-16. More specifically, "a general perception existed that a need existed to ameliorate the criminal penalties." Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST. 55, 79 (2004). The European theorists who advocated for parsimony in the meting out of criminal punishments provided much of the intellectual horsepower for these reform efforts. *Id.* at 78-79.

Thomas Jefferson, in particular, was deeply influenced by Beccaria. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89 (2005). Jefferson's work in the 1770s as part of the Virginia Committee of Revisors for the reform of the

State's legal system drew on Beccaria's insistence on strict proportionality between punishment and crime. The annotations to Jefferson's 1778 "A Bill for Proportioning Crimes and Punishments" contain multiple references to Beccaria's treatise, and in a later letter, Jefferson noted that "'Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death.'" Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 818. John Adams was intellectually indebted to Beccaria as well. Adams owned a copy of the 1775 London edition of *On Crimes and Punishments*, and he thought highly enough of Beccaria's work both to give the book as a gift to his son in 1800, see *Beccaria* at 9 (Comments), and to quote Beccaria during his famous defense of the British soldiers accused of murder during the Boston Massacre, see Schwartz & Wishingrad, *supra*, 24 BUFF. L. REV. at 813-14.

B. As the text of § 3553(a) indicates, the Enlightenment-era insights of Montesquieu, Beccaria, and Bentham that punishment must be not greater than necessary to advance particular objectives are not some moribund historical curiosity. Through the work of scholars whose efforts at criminal law reform echoed that of the founding generation, the principle of parsimony was given new currency in the twentieth century. Foremost among these reformers was Norval Morris of The University of Chicago Law School. Morris's book, THE FUTURE OF IMPRISONMENT (U. Chicago Press 1974), identified parsimony as one of the basic norms that must guide any legitimate sentencing process. See generally Michael Tonry, *Preface*, 32 CRIME & JUSTICE vii, viii (2004) (describing Morris as "a criminal-justice institution

builder of unmatched influence, and his ideas about punishment have transformed the ways people think"). In Morris's influential formulation, the parsimony principle stated that "[t]he least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974); see also Tonry, *supra*, 32 CRIME & JUSTICE at ix (explaining that "a principle of parsimony requires imposition of the least severe applicable punishment unless good, empirically grounded reasons exist for doing more"). Like Beccaria, Morris argued that parsimony is not merely a utilitarian virtue, but also a moral imperative. Morris thus wrote that a "system of criminal justice that is not infused with parsimony in punishment * * * creates an intolerable engine of tyranny." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 155 (U. Chicago Press 1982).

Although Morris's influence has been unparalleled, he himself observed that he was hardly alone in advocating parsimony as the touchstone of sentencing. He noted that a presumption in favor of less severe punishments "pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond social need is, presumably, what defines cruelty." Morris, *supra*, 72 MICH. L. REV. at 1163. Thus, in endorsing the parsimony principle, Morris was "on well-trodden ground"; the "American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and two recent national crime commissions have advocated parsimonious use of imprisonment." Andrew Ruth-

erford, *A Review of Norval Morris' The Future of Imprisonment*, 66 J. CRIM. L. & CRIMINOLOGY 380, 383 (1975).

The widespread acceptance of the parsimony principle in our own time should come as no surprise. Indeed, it seems almost intuitive to say that punishment not limited by the principle of parsimony is both immoral and wasteful; such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). In pursuing the goal of parsimony, therefore, it must always be remembered that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). Moreover, this emphasis on the need to justify a particular quantum of punishment against a set of defined goals illustrates that the parsimony principle includes both a substantive and a procedural dimension. Substantively, it "limits punishments to the least restrictive sanction possible," while procedurally, it "requires the state to prove why the offender deserves a particular punishment." *Id.* at 1015.

C. Just as parsimony is not an eighteenth century relic, neither does it find a home only in the academic library or lecture hall. To the contrary, it is now a congressional command. When Congress enacted the SRA in 1984, it distilled the philosophical idea of parsimony into the statutory requirement that district courts "*shall impose a sentence sufficient, but not greater than necessary*, to comply with

the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a) (emphasis added). Implicitly acknowledging Morris's understanding that parsimony requires a set of defined social purposes for punishment, paragraph (2) seeks to capture the four generally accepted justifications of criminal punishment. These are: retribution (subparagraph (A)); deterrence (subparagraph (B)); incapacitation (subparagraph (C)); and rehabilitation (subparagraph (D)).

In light of the parsimony principle's history in American criminology, Congress's decision to include it in the SRA as an overarching concept is hardly surprising. In fact, given the central role that the parsimony principle occupied in sentencing reform circles in the years leading up to the enactment of the SRA (which was nothing less than an implementation of the Founders' values), it would have been more remarkable had the new law *not* placed such emphasis on the concept of parsimony.

As originally enacted, however, the command to impose sentences based on the principle of parsimony stood in direct tension with a rival statutory obligation. At the same time that § 3553(a) instructed judges to impose a parsimonious sentence, § 3553(b)(1) instructed them that the "the court shall impose a sentence of the kind, and within the range," provided by the applicable provision of the Sentencing Guidelines. *Booker*, 543 U.S. at 259 (Breyer, J.). In *Booker*, this Court noted the patent conflict between § 3553(a) and § 3553(b)(1): "While subsection (a) of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall*

impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 233-34 (Stevens, J.).

The tension created by these competing sentencing directives was a product of the SRA's convoluted legislative history and the realities of political compromise. The Senate was the primary force behind the federal sentencing reform effort, and most of the provisions of the final bill originated in that body. This was true of § 3553(b)(1). See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 271 & n.296 (1993). The parsimony directive, however, originated in the House of Representatives. A bill sponsored by Representative Conyers and reported out of the House Judiciary Committee in June 1984—a bill that was more in line with a system of advisory guidelines—included a provision directing judges "to impose the sentence (whether or not a departure from advisory guidelines) that *would be the 'least severe' sufficient to serve the purposes of sentencing.*" *Id.* at 262 (quoting H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added)). In October 1984, "Senator Mathias succeeded in obtaining an amendment to add a new first sentence to the directives to the sentencing court along the lines suggested by Representative Conyers." *Id.* at 271. It was this amendment (cosponsored by Senator Thurmond) that added the "sufficient, but not greater than necessary" language eventually codified in § 3553(a). See *id.* at 271-72; 130 CONG. REC. 29,870 (1984).

Under the House bill, the obligation to sentence consistent with the principle of parsimony—rather than mandatory guidelines—would have been the primary command given to the district courts. Thus, where the Guidelines suggested a sentence that the court deemed more severe than necessary, the Guidelines would have had to give way. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. When the parsimony directive was added to the Senate bill, however, it was forced to vie for influence with what became § 3553(b)(1)'s command to abide by the Guidelines. Because Congress never addressed, much less resolved, the tension, *id.*, the courts and the Sentencing Commission were left to work it out.

But, instead of confronting the statutory contradiction as a problem to be solved through ordinary principles of construction, the courts "essentially ignored not only the parsimony language, but the entire set of congressional directives to judges in 3553(a)." Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999). Indeed, the parsimony provision became "almost hortatory in practice when placed against the mandate that erects a presumption in favor of the guideline sentence." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 272. The obligation to impose a Guidelines-compliant sentence thus ultimately trumped the requirement of parsimony. That triumph of § 3553(b)(1) was ensured primarily by two factors: this Court's repeated admonitions that the Guidelines were to be followed, see, *e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993); and the ever-present threat of appellate reversal for judges who strayed from what the Guidelines required, see 18

U.S.C. § 3742(e)(3)(B)(ii); *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

All of that changed, however, with the decision in *Booker*. The remedial majority opinion resolved the conflict between the parsimony directive and the mandatory Guidelines sentencing command by invalidating the two provisions of the SRA that had kept the parsimony directive from playing its proper role in the federal sentencing process for the previous two decades. *Booker*, 543 U.S. at 259 (Breyer, J.) (severing and excising § 3553(b)(1) and § 3742(e) to bring the SRA into compliance with the Sixth Amendment). The result of this statutory surgery is that the parsimony directive in § 3553(a) now stands as the sole substantive mandate that binds district judges when they impose sentences. *Id.* at 261. Federal courts therefore must take the congressional command of parsimony seriously at every step of the sentencing process. In this sense, the SRA now resembles something akin to the original House bill described above. As in that bill, the Guidelines now exist *only* as advisory provisions that a sentencing court must consider, but before which it need not bow. See *Rita* v. *United States*, 127 S. Ct. at 2466-67. The parsimony directive has prevailed, and the obligation to impose a sentence "sufficient, but not greater than necessary" to achieve the specified purposes of sentencing is preeminent. When, in the judgment of the sentencing court, that obligation clashes with the sentence suggested by the Guidelines, it is now the Guidelines that must give way.

II. Federal Sentencing Must Be Guided By Reasoned Judgment, Individualized Consideration, And Deferential Appellate Review—All Subject To The Overarching Command Of Parsimony.

Beyond making clear that the Guidelines are no longer binding—and thus enabling the parsimony principle in 18 U.S.C. § 3553(a) finally to take center stage—this Court's decisions in *Booker* and *Rita* establish two crucial propositions with profound implications for federal sentencing.

First, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465. Thus, although the district court still must calculate the advisory guideline range, there is no thumb on the scale in favor of imposing a within-guideline sentence. In other words, although a properly calculated guideline range is a factor that a sentencing court must always consider, the court is forbidden in all cases from treating that range as a tether or touchstone.

Second, whether the district court selects a sentence inside or outside the advisory guideline range, the sentence ultimately imposed (as long as it results from a process that complies with the statutory directives, including the obligation to provide a sufficient statement of reasons under § 3553(c)) is entitled to substantial deference on appellate review. See *Rita*, 127 S. Ct. at 2472-73 (Stevens, J., concurring). An appellate court thus may not begin its review with the presumption that a sentence outside the guideline range is unreasonable, unworthy of

deference, or requires special justification. *Id.* at 2467.

A. The upshot of these principles is that the primary actor in the sentencing process is the district judge. In imposing sentence, he or she is to be guided not by any artificial presumptions, but instead by the factors set forth in 18 U.S.C. § 3553(a) and, of course, by the overriding mandate of parsimony. To discharge that statutory mandate, the sentencing court first must "consider" each of the enumerated factors, insofar as they are relevant, and determine how each of them would (or would not) be advanced by reducing (or increasing) a quantum of punishment.

This process offers an occasion for the sentencing judge to make a reasoned moral choice about how to punish a particular defendant most appropriately in light of all the facts and circumstances of his or her case. It ensures *both* that the ultimate sentence is appropriate for the individual defendant *and* that it is the product of a clear and established set of principles and standards. In this way, the statutory requirements reflect the importance of two basic components of just sentencing: individualized tailoring and reasoned judgment.

Those requirements have the additional virtue of forcing the sentencing court to take full moral and legal responsibility for the sentence imposed. No longer can a judge deflect responsibility onto the bureaucracy of the Sentencing Commission or take refuge behind a numerical grid. Such direct accountability requires the exercise of "deliberation and moral judgment," Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*,

91 NW. U.L. REV. 1247, 1256 (1997)—something that is at the core of judging, but that has been lost in the era of mandatory Guidelines.

B. In turn, the purpose of appellate review in this scheme is simply, but importantly, to ensure that district judges do not stray from those statutory requirements. Appellate review is not, and may not be, an exercise aimed at surreptitiously restoring a regime of effectively mandatory Guidelines. Nor does it provide an occasion for appellate judges to substitute their judgment for that of district judges who have faced defendants personally, evaluated their circumstances and the circumstances of their crimes, and passed sentence accordingly. It follows that the same deferential standards must be applied to assess the validity of a sentence, regardless of whether it falls within the guideline range, above the range, or below it. That is why, as *Booker* suggested and *Rita* confirmed, appellate review of *all* sentencing determinations is now to be governed by a unitary abuse-of-discretion standard.

Before *Booker*, sentences were subjected to different standards of review depending on whether they fell inside or outside the applicable guideline range. By virtue of the PROTECT Act of 2003,[2] sentences outside the range were subject to de novo review and could be invalidated if the court of appeals deemed a departure legally impermissible or "unreasonable." 18 U.S.C. § 3742(e)(3), (f). In contrast, sentences within the range could be invalidated only if they were imposed "in violation of law" (for example,

[2] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670.

if the district court erred in calculating the applicable range). 18 U.S.C. § 3742(e)(1). Under the pre-*Booker* regime, therefore, a sentence within a properly calculated guideline range was effectively unreviewable, in the absence of procedural error or a misapprehension of the scope of the court's discretion. See, *e.g.*, *United States* v. *Woodrum*, 959 F.2d 100, 101 (8th Cir. 1992) (per curiam); *United States* v. *Garcia*, 919 F.2d 1478, 1482 (10th Cir. 1990).

The PROTECT Act stands as the high-water mark of an unconstitutional federal sentencing regime. *Booker*, 543 U.S. at 261 (de novo standard of review was designed "to make Guidelines sentencing even more mandatory than it had been"). In excising § 3742(e) and imposing a single "reasonableness" standard to be applied "across the board," 543 U.S. at 263 (Breyer, J.), the remedial majority in *Booker* extended to all cases the abuse-of-discretion standard that had governed review of departures before the PROTECT Act. See *Rita*, 127 S. Ct. at 2465 ("'reasonableness' review merely asks whether the trial court abused its discretion"); *id.* at 2470-71 (Stevens, J., concurring). As Justice Stevens' concurring opinion in *Rita* states, appellate courts must "give deference to the sentencing decisions made by [district] judges, *whether the resulting sentence is inside or outside the advisory Guidelines range*, under traditional abuse-of-discretion principles." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) (emphasis added). The presumption of reasonableness upheld in *Rita* is thus best understood as an *example* of a larger principle of appellate deference to the district court. It is part and parcel of what amounts to a presumption in favor of affirmance that accompanies *any* discretionary decision made by a trial judge

more familiar with the circumstances of a particular case.

This Court's most complete explication of the principle of deference came in *Koon*, 518 U.S. 81. *Koon* held that an abuse-of-discretion standard applied on review of a departure from the then-mandatory guideline range. *Id.* at 96-100. Because the effect of *Booker*'s statutory surgery was to impose for *all* sentences the standard of review that *Koon* had applied to departures, an examination of *Koon*, and the cases on which it relies, illustrates the nature of appellate review that now governs. Most importantly, *Koon* made clear that appellate review was not intended "to vest in appellate courts wide-ranging authority over district court sentencing." 518 U.S. at 97. To the contrary, *Koon* provided that the district court "retains much of its traditional discretion," and its sentencing decisions thus are "due substantial deference." *Id.* at 98.

That is so because "deference [is] owed" to the district court because it is clearly the "'judicial actor * * * better positioned * * * to decide the issue in question.'" *Koon*, 518 U.S. at 99 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-60 (1988)). After all, a district judge is far better able than an appellate court "to make a refined assessment of the many facts bearing" on a sentencing decision, "informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. Deference thus affords the district court "the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (quoting *Pierce*, 487 U.S. at 561-62).

In the wake of *Booker* and *Rita*, appellate courts reviewing sentences for reasonableness must heed these lessons and recognize the institutional disadvantages they face in conducting a searching review of a district judge's fact-bound, discretionary act of selecting an individual sentence. Cf. *Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983) (quoting *Boyd* v. *Boyd*, 169 N.E. 632, 634 (N.Y. 1930)) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded."). Unless and until Congress directs otherwise, therefore, "'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)).

To the contrary, *Booker* and *Rita* have restored the principle of "*limited* appellate review of sentencing decisions," a form of review meant to preserve "a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams*, 503 U.S. at 205 (emphasis added); see also *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) (noting that "deference" is the "hallmark of abuse-of-discretion review" and reversing court of appeals decision that applied an "overly 'stringent' review" to a district court ruling). Such review facilitates the exercise of individualized decision-making and reasoned judgment that, as discussed above, should be the hallmarks of the federal sentencing regime. It allows the district court room to consider the specific circumstances in every case, while minimizing the risk of surrendering to arbitrariness or anarchy. This ensures that the discretion integral to just sen-

tencing remains appropriately bounded by both law and reason.

C. Finally, given the overarching parsimony command of § 3553(a), an appellate court engaged in substantive reasonableness review should ask itself the same fundamental question that Montesquieu, Beccaria, Bentham, and Norval Morris posed: Was the district court reasonable in concluding, or did it fail to ascertain, that the judgment of sentence represents the *least severe* punishment necessary to achieve the specified purposes of the criminal law? That is because "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes'" of sentencing specified in § 3553(a)(2). *United States* v. *Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006); accord *United States v. Kikumura*, 918 F.2d 1084, 1111 (3d Cir. 1990) (Becker, J.) (characterizing the command as a statutory duty to impose a "minimally sufficient" sentence). Just as the procedural mandate that a district court "shall consider" the prescribed sentencing factors must inform the appellate review process, see *Rita*, 127 S. Ct. at 2467-68, so too must the normative mandate that the district court impose a parsimonious sentence. Therefore, if the appellate court is *not* convinced that the district judge reasonably concluded that he or she imposed the least burdensome sanction that would have satisfied the specified purposes of punishment, the unparsimonious sentence should be vacated. In this way, appellate review plays an important role in ensuring that punishment is never imposed wastefully or gratuitously.

* * *

The concept of reasonableness review articulated in *Booker* and *Rita* holds out the prospect of a truly just and humane sentencing process. Respecting the statutory command of parsimony fosters and embodies the importance of respecting the law as written. Requiring courts to consider carefully the various purposes of punishment and to explain their sentences openly and rationally ensures that every case will receive individualized consideration and that sentences will be based on the exercise of reason rather than caprice. And, finally, remembering that punishment requires moral justification, and that it imposes significant costs on individuals that must always be justified, ensures that all people—including criminal defendants—are treated as ends rather than as means.

III. The Eighth Circuit's Special Justification Requirement Is Inconsistent With This Court's Cases And Violates The Sixth Amendment.

When the principles articulated above are applied to this case, it is clear that the Eighth Circuit's approach to appellate review of sentencing decisions is profoundly misguided.

Invoking established circuit precedent, the court of appeals held that, though a sentence outside the guideline range might in some cases be reasonable, such sentences require clear justification "proportional to the extent of the difference between the advisory range and the sentence imposed." *United States* v. *Gall*, 446 F.3d 884, 889 (8th Cir. 2006). This rule means that "the farther the district court

varies from the presumptively reasonable guideline range, the more compelling the justification based on the § 3553(a) factors must be." *Id.* Moreover, an "extraordinary variance" (a term that the court did not define) from the guideline range "must be supported by extraordinary circumstances." *Id.* The court then applied this standard of review to hold that the below-guideline sentence given to Brian Gall "lies outside the limited range of choice dictated by the facts of the case." *Id.*

This reasoning is flawed at every turn. To begin with, there is a significant difference between saying, as this Court did in *Rita*, that a within-guideline sentence imposed by the district court may be presumed reasonable on appeal, and saying, as the Eighth Circuit did here, that a guideline sentence is *the presumptively reasonable sentence.* It is the difference, one integral to the decision in *Rita*, between an appellate presumption and a presumption that binds the sentencing court itself. What *Rita* allowed was the former. Such a presumption, the Court held, has no "independent legal effect," and "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita*, 127 S. Ct. at 2465. In contrast, a requirement that there be special justification "the farther the district court varies from the presumptively reasonable guidelines range," *Gall*, 446 F.3d at 889, erects a presumption that quite plainly *does* have independent legal effect. It establishes the guideline range as presumptively reasonable and directs the district courts to do likewise: to sentence within that range unless special factual cir-

cumstances—present in some, but not all, cases—demand otherwise. That formulation flies in the face of *Rita*'s insistence that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465.

What is more, the Eighth Circuit's "extraordinary circumstances" requirement distorts the nature of reasonableness review required by *Rita* and, even worse, reinstates the very sort of binding Guidelines regime held unconstitutional in *Booker*. As this Court's Sixth Amendment cases make clear, a constitutional system of judge-applied guidelines is distinguished by the sentencing court's freedom to impose a sentence outside of the suggested range, and to do so without finding any additional facts. See, *e.g.*, *Cunningham* v. *California*, 127 S. Ct. 856, 870 (2007); *Blakely* v. *Washington*, 542 U.S. 296, 304 (2004). If the judge *must* make some factual finding *before* giving the defendant a greater sentence, the Sixth Amendment is violated. The constitutional violation is the same regardless of whether that requirement is imposed through a direct statutory command to the sentencing court or through the operation of appellate review. See *Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring in part and concurring in the judgment). That is why the remedial majority in *Booker*, to save the Guidelines, excised 18 U.S.C. § 3742(e). That provision used appellate review to constrain the ability of district courts to sentence outside of the guideline range and thus brought the Guidelines into conflict with the Sixth Amendment. *Booker*, 543 U.S. at 259 (Breyer, J.).

The Eighth Circuit's Guidelines-centric approach to reasonableness review deprives sentencing courts of the freedom that *Booker* held was constitutionally indispensable. Its approach forbids a district court from imposing an above- or below-guideline sentence unless it first makes factual findings sufficient to demonstrate that such a variance is justified. If that finding is not made, or if the court of appeals deems it insufficient or unjustified, the sentence will be held invalid. Under this rule, the Guidelines are advisory in name only. After all, the mine-run of cases do not, by definition, involve "extraordinary circumstances." In such cases, a sentence significantly above or below the guideline range thus will be legally impermissible.

The fact that out-of-guideline sentences may be imposed in *some* cases no more saves the Eighth Circuit's regime than did the fact that courts before *Booker* could on some occasions depart under § 3553(b) from the otherwise applicable guideline range. Instead, what matters is that variances based on extraordinary circumstances, like departures under the Guidelines, "are not available in every case, and in fact are unavailable in most." *Booker*, 543 U.S. at 234 (Stevens, J.). As such, the "availability of a departure in specified circumstances does not avoid the constitutional issue." *Id.* The Eighth Circuit's rule restores to the federal sentencing system the same constitutional problem identified and cured in *Booker*.

Indeed, the "extraordinary circumstances" standard makes the Guidelines virtually indistinguishable from the unconstitutional sentencing regime struck down in *Blakely*. Under that regime, a judge

could impose a sentence above the "standard range" only if he found "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299; see also *Booker*, 543 U.S. at 234 (Stevens, J.). In most instances, the factual findings that provided compelling reasons for sentencing outside the standard range were not embodied in the jury verdict or guilty plea and thus had to be found by the judge alone. The Court in *Blakely* had little trouble concluding that such a system violated the Sixth Amendment. *Blakely*, 542 U.S. at 304-05.

There simply is no valid constitutional distinction between a rule forbidding significant departures except in "extraordinary circumstances" and a rule forbidding departures except for "substantial and compelling reasons." Under both rules, judicial fact-finding is necessary to supply the legal justification for sentencing above or below a properly calculated guideline range. And, under both rules, there is a significant set of cases in which a non-standard sentence simply is unavailable. Indeed, this very case illustrates that reality. The Eighth Circuit's conclusion that the "extraordinary variance is not supported by extraordinary justifications," had the effect of making Brian Gall's out-of-guideline sentence legally impermissible. *Gall*, 446 F.3d at 889-90. No less than in *Blakely* or *Booker*, therefore, the sentencing regime adopted by the court of appeals here runs contrary to the imperative of the Sixth Amendment.

Finally, the fact that the Eighth Circuit has not laid down a specific set of factual findings that constitute the "extraordinary justifications" necessary to support a "reasonable" out-of-guideline sentence,

Gall, 446 F.3d at 889, is irrelevant. For Sixth Amendment purposes, it does not matter whether the facts found by the sentencing judge in order to justify an enhanced sentence are:

- expressly specified by the legislature (as in *Apprendi* v. *New Jersey*, 530 U.S. 466, 468-69 (2000) (sentence enhanced if judge found that defendant committed the crime "with a purpose to intimidate * * * because of race, color, gender, handicap, religion, sexual orientation or ethnicity"));
- selected by the judge out of a limited and defined range (as in *Ring* v. *Arizona*, 536 U.S. 584, 592-93 (2002) (sentence enhanced if judge found any one of 10 statutory aggravating factors)); or
- selected by the judge in service of making a general and subjective finding (as in *Cunningham*, 127 S. Ct. at 861-62 (sentence enhanced if judge found that there were "circumstances in aggravation" of the crime)).

The upshot of these decisions is clear: "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of [the Court's] decisions." *Cunningham*, 127 S. Ct. at 869.

Thus, even insofar as the Eighth Circuit's standard purports to give discretion to district courts to select the facts constituting "extraordinary circumstances"—and its stringent review in this case sug-

gests that it does not[3]—that requirement is still constitutionally infirm. It violates the Sixth Amendment because it all but insures that some sentences well above the guideline range will be approved (or rejected) *only* because the district court found (or failed to find) certain facts, not attributable to the jury verdict or guilty plea, that comprised a sufficiently "extraordinary" circumstance. Because the Jury Trial clause thus would forbid the Eighth Circuit's standard from being applied to above-guideline sentences, and because "no one would contend that Congress intended that sentences be reviewed only for being too low," *Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring in part, and concurring in the judgment), the Eighth Circuit's standard has no place in the scheme of "reasonableness" review required by the SRA in light of this Court's cases.

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[3] For example, the Eighth Circuit appears simply to have disagreed with various conclusions of the district court—including the district court's conclusion that Mr. Gall demonstrated post-offense rehabilitation by earning a bachelor's degree and starting his own business—that resulted in the probationary sentence. *Gall*, 446 F.3d at 890. In marked contrast to the court of appeals' opinion, the district court thoroughly addressed Mr. Gall's personal circumstances, the nature of his offense, and other factors underlying its determination that a term of imprisonment would be greater than necessary to meet the specified purposes of punishment. The appellate court thus did little more than substitute its judgment for that of the district court and arrogate to itself the role of sentencer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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